95-1598 (1)

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

LEROY L. YOUNG and
ATTORNEY GENERAL OF OKLAHOMA,
Petitioners,

v.

ERNEST EUGENE HARPER,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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April, 1996 * Counsel of Record

91pp

QUESTION PRESENTED

1. Whether the Preparole Conditional Supervision Program enacted pursuant to Okla. Stat. tit. 57, § 365 (Supp. 1990) is more similar to parole or minimum security imprisonment; and, thus, whether continued participation in such program is protected by the Due Process Clause of the Fourteenth Amendment.

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v.

ERNEST EUGENE HARPER,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

Leroy L. Young and the Attorney General of Oklahoma respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 64 F.3d 563 and is reprinted at pages 1a to 15a of the accompanying appendix to this petition ("Pet. App."). The Order of February 13, 1996, denying the Petition for Rehearing and Suggestion for Rehearing *En Banc* has not been reported. It is reprinted at pages 16a to 17a of the appendix. The Order of February 28, 1996, reflecting that five judges would have granted rehearing has not been reported. It is reprinted at pages 18a to 19a of the appendix.

The District Court's Order entered January 10, 1995 has not been reported. It is reprinted at pages 20a to 37a of the appendix. Additionally, the Opinion of the Oklahoma Court of Criminal Appeals is reported at 852 P.2d 164 and is reprinted at pages 38a to 42a of the appendix.

STATEMENT OF JURISDICTION

The Judgment and Opinion of the Court of Appeals was entered on August 30, 1995. Pet. App. at 1a to 15a. The Order denying Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on February 13, 1996. Pet. App. at 16a to 17a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV (Section 1):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws.

STATUTES

Okla. Stat. tit. 57, § 365 (Supp. 1990):

Preparole Conditional Supervision Program

A. Whenever the population of the prison system is certified by the State Board of Corrections as exceeding ninety-five percent (95%) of its capacity, as defined in Section 571 of Title 57 of the Oklahoma Statutes, the Department of Corrections and the Pardon and Parole Board shall implement a Preparole Conditional Supervision Program until such time as the population is reduced to ninety-two and one-half percent (92 1/2%) of capacity, for persons in the custody of the Department of Corrections who meet the following guidelines:

1. Only inmates who are otherwise eligible for parole, pursuant to Sections 332.7 and 332.8 of Title 57 of the Oklahoma Statutes, shall be eligible to participate in this program; and

2. An inmate shall serve at least fifteen percent (15%) of his sentence of incarceration and be within one (1) year of his regularly scheduled parole consideration date or be within one (1) year of his projected release date, prior to being eligible for this program.

B. Upon an inmate becoming eligible for this program it shall be the duty of the Pardon and Parole Board, with or without application being made, to cause an examination to be made of the criminal record of the inmate and to make inquiry into the conduct and the record of said inmate during his confinement in the custody of the Department of Corrections.

C. Upon favorable recommendation by the Pardon and Parole Board, notification shall be made to the Department of Corrections that said inmate has been recommended to be placed in this program.

D. Prior to the placement of an inmate on Preparole Conditional Supervision, the Department shall provide written notification to the sheriff and district attorney of the county in which any person on Preparole Conditional Supervision is to

be placed and to the chief law enforcement officer of any incorporated city or town in which said person is to be placed of the placement of the person on Preparole Conditional Supervision within the county or incorporated city or town. The Department also shall provide written notification of the placement of the person on Preparole Conditional Supervision within the county or incorporated city or town to any victim of the crime for which the inmate was convicted by mailing the notification to the last-known address of the victim, if such information is requested by the victim. The Department of Corrections shall not give the address of the inmate to any victim of the crime for which the inmate was convicted.

E. Should an inmate violate any rule or condition during the period of community supervision, the inmate shall be subject to disciplinary proceedings as established by the Department of Corrections.

F. Any inmate who escapes from this program shall be subject to the provisions of Section 443 of Title 21 of the Oklahoma Statutes.

STATEMENT OF THE CASE

This case presents the Court with an opportunity to provide necessary guidance to many lower courts which must address the issue of whether a program which provides an intermediate punishment for inmates, supervised and regulated by state department of corrections, but which allows the inmate to enter and live in the community, is more similar to parole or a minimum security prison. Such a determination is required to resolve the issue of whether the inmate has a liberty interest in continued participation in such a program. The jurisdiction of the District Court was based on 28 U.S.C. § 2241.

A. Trial Court Proceedings.

In 1992, the Respondent, Ernest Eugene Harper, filed a petition for writ of habeas corpus with the Oklahoma Court of Criminal Appeals alleging that he was improperly removed from the Preparole Conditional Supervision Program (the "Program") without the due process requirements set forth in Morrissey v. Brewer, 408 U.S. 471 (1972). At the same time that the Court of Criminal Appeals was considering the Respondent's petition, another inmate, Matthew W. Barnett, had a similar action pending before the Court. See Barnett v. Moon, 852 P.2d 161 (Okla. Crim. App. 1993).

The primary difference between the two actions, however, was that Mr. Barnett had been removed from the Program for disciplinary reasons.[1] The Respondent, however, was removed from the Program because he had been denied parole by the Governor of the State of Oklahoma. See Harper v. Young, 852 P.2d 164, 165 (Okla. Crim. App. 1993). Pet. App. at 38a to 42a.

The Court of Criminal Appeals held that the Respondent was aware, when placed on the Program, that if denied parole he may be removed from the Program. Thus, the Respondent had suffered no due process violation.[2] Pet. App. at 40a to 41a.

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[1]Mr. Barnett was arrested for public drunk. Barnett, 852 P.2d at 163.

[2]In Barnett, the Court held that due to the disciplinary reason for the removal, Mr. Barnett was entitled to due process set forth in Wolff v. McDonnell, 418 U.S. 539 (1974). Mr. Barnett was not only returned to an institutional facility but also lost good time

B. Proceedings in the District Court.

On October 13, 1993, the Respondent filed a Petition for Writ of Habeas Corpus with the District Court. Again, Respondent alleged that he was denied due process when removed from the Program. The District Court, after discussing whether the Respondent had a liberty interest in remaining on the Program under the Fourteenth Amendment or created by state law, denied the Respondent any relief. Pet. App. 20a to 37a.

The District Court concluded that because this Court had "steadfastly refused to expand the scope of liberty interest," the Respondent did not have a liberty interest in remaining on the Program protected by the

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credits.

Fourteenth Amendment. Pet. App. at 34a to 35a. The District Court also found that the state had not created a liberty interest in remaining on the Program. Pet. App. at 35a to 37a.

C. Proceedings in the Court of Appeals.

The Respondent timely appealed from the District Court's Order denying his petition for writ of habeas corpus. The Court of Appeals reversed the decision of the District Court. Pet. App. at 1a to 15a.

The Court of Appeals held that placement on the Program furnishes an inmate with a liberty interest in continued participation protected by the Fourteenth Amendment. The Court of Appeals held, in accordance with the Eighth Circuit Court of Appeals in Edwards v. Lockhart, 908 F.2d 299 (8th Cir. 1990), that when a

program releases an inmate into society on a full-time basis, the program more closely resembles parole or probation than any other form of institutional confinement. Pet. App. at 12a. Thus, the Court of Appeals held that the Respondent was entitled to the procedural safeguards provided in Morrissey v. Brewer. Pet. App. at 12a.

Petitioner filed a petition for rehearing and suggestion for rehearing en banc. On February 13, 1996, the Court of Appeals issued its Order denying rehearing and suggestion for rehearing en banc. Pet. App. at 16a to 17a.

On February 28, 1996, the Court of Appeals issued an amendment to its Order denying rehearing,

reflecting that five judges would have granted rehearing. Pet. App. at 18a to 19a.

REASONS FOR GRANTING THE WRIT

The Court's review of this matter is necessary because:

A. The lower Federal courts, which frequently address the issue presented, need this Court's guidance on the issue, particularly since there is a split in the circuits on the issue;

B. The Court of Appeals has decided the issue in a manner which conflicts with the decision of the Court of Criminal Appeals, the state court of last resort; and

C. This issue is an important issue which has not, but should be, decided by this Court.

A. The lower Federal courts, which frequently address the issue presented, need this Court's guidance on the issue, particularly since there is a split in the circuits on the issue.

The Tenth Circuit Court of Appeals, in the opinion below, concluded that, due to the inmate's release from the four walls of incarceration, the Program "more closely resembles parole or probation than even the more permissive forms of institutional confinement." Pet. App. at 12a. Due to such finding, the Tenth Circuit held that the Respondent had a liberty interest derived from the Fourteenth Amendment to remain in the Program. The Tenth Circuit was persuaded by the holding of the Eighth Circuit Court of

Appeals in Edwards v. Lockhart, 908 F.2d 299 (8th Cir. 1990) and joined in that holding.

In sharp contrast to the conclusion reached on this issue by the Eighth and Tenth Circuits, the Second Circuit, in United States v. Taylor, 47 F.3d 508 (2d Cir. 1995), held that the Connecticut Supervised Home Release program, which is strikingly similar to the subject Program, is a type of confinement. Thus, the Second Circuit held that the degree of confinement is more analogous to that of an inmate in a minimum security prison.

The issue in Taylor was whether the inmate was released from confinement when placed on the program. Although the issue in Taylor was not whether the inmate had a liberty interest in remaining on the Connecticut

program, the decision of whether the program was a type of confinement was determinative of the issue raised.

Furthermore, the Second Circuit discussed and agreed with the finding of the Connecticut Supreme Court which held that no liberty interest existed in continued participation in the program. See Asherman v. Meachum, 213 Conn. 38, 566 A.2d 663 (1989). This finding directly conflicts with the finding of the Eighth and Tenth Circuits.

Clearly the lower Federal courts need this Court's guidance on this issue, given that there is a split in the circuit courts. Furthermore, as the Second Circuit noted, many other jurisdictions are experimenting with such intermediate punishments. Accordingly, the issue

will appear before the Federal courts on an increasing frequency. This issue cannot be resolved and applied in a consistent manner without review by this Court.

B. The Court of Appeals has decided the issue in a manner which conflicts with the decision of the Court of Criminal Appeals, the state court of last resort.

As stated above, the Tenth Circuit Court of Appeals, in the opinion below, concluded that, due to the inmate's release from the four walls of incarceration, the Program "more closely resembles parole or probation than even the more permissive forms of institutional confinement." Pet. App. at 12a. The Court of Criminal Appeals for the State of Oklahoma decided in Barnett v. Moon, 852 P.2d 161, 163 (Okla. Crim. App. 1993), that only the degree of the inmate's confinement is affected by his placement in the

Program. The Court of Criminal Appeals based its determination on the statutory provisions that (1) the inmate on the Program remains within the custody of the Oklahoma Department of Corrections and (2) the inmate is subject to the disciplinary proceedings as established by the Department of Corrections should he violate any of the rules or conditions of the Program. Okla. Stat. tit. 57, § 365(A) (1991).

The Court of Criminal Appeals found that the Program was a degree of confinement; whereas, the Tenth Circuit found the Program to be analogous to parole. Such decisions distinctly conflict.[3] The only means for resolution of this conflict is a decision by this Court. Thus, it is imperative that the writ be granted.

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[3]In Barnett, the Oklahoma Court of Criminal Appeals found Edwards v. Lockhart inapplicable. The Tenth Circuit, however, specifically held that they were persuaded by Edwards.

C. This issue is an important issue which has not, but should be, decided by this Court.

The Preparole Conditional Supervision Program is a program which was instituted by the Oklahoma Legislature due to the overcrowding of the prisons within the State of Oklahoma. Pursuant to Title 57, Section 365 of the Oklahoma Statutes, the Program is to be used only when the population of the prison system exceeds ninety-five percent (95%) of its capacity. As noted by the Second Circuit, unfortunately, many other states are implementing similar programs to relieve the continually growing problem of prison overcrowding. Taylor, 47 F.3d at 509. As a result, the issue will more frequently appear before state and federal courts.

Accordingly, it is imperative that a determination be made by this Court as to what process is due an inmate who is placed on such a program before he can be removed from such program. Is the inmate entitled to due process as set forth in Morrissey v. Brewer, 408 U.S. 471 (1972) (revocation of parole) or as set forth in Wolff v. McDonnell, 418 U.S. 539 (1974) (degree or situs of confinement)? Only in very limited circumstances has this Court held that a liberty interest has arisen in favor of an inmate under the Constitution whose original confinement was lawful. See Morrissey v. Brewer, (revocation of parole); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (revocation of probation); Vitek v. Jones, 445 U.S. 480 (1980) (involuntary transfer of inmate to mental hospital). The status of an inmate under the Program is not the same as any of the liberty interests previously recognized by this Court.

The status of an inmate on such a program is not the same as a parolee. The only similar features of the Program and parole are that the inmate is allowed to work outside of the correctional facility and may reside in his own home.

Pursuant to Okla. Stat. tit. 57, § 365 (Supp. 1990), an inmate placed on the Program remains in the custody of the Oklahoma Department of Corrections. An inmate placed on the Program is aware that he can be removed from the program if he (1) becomes ineligible for parole; or (2) fails to satisfactorily attend and make progress in the educational program he is required to attend. In addition, an inmate is aware that if any rule or condition of the Program is violated, the inmate will be subject to the disciplinary proceedings of the Department of Corrections. Thus, the inmate is

clearly aware that while on the Program he remains in the custody and confines of the Department of Corrections.

In addition, the inmate is aware that if he should fail to report as required, he will be considered an escapee and will be subject to the provisions of Okla. Stat. tit. 21, § 443 (1991). Each of these provisions are exclusive to the Program.

As stated in Morrissey, a parolee relies on an implicit promise that parole will be revoked only if he violates a condition of parole. An inmate on the Program does not have such a promise on which to rely because the inmate is aware that he may be removed from the Program merely because he no longer meets the eligibility requirements of continued participation.

Thus, it is clear that an inmate placed on the Program is not the equivalent of a parolee.

As this Court has continually refused to expand the scope of liberty interest, a determination of whether a liberty interest arising from the Constitution will be expanded to such a preparole program is crucial.

A decision concerning what process is due an inmate placed in such a Program, where the inmate does not have the same liberties as a parolee but is also not behind four walls, is an important issue which has not, but should be addressed by the Court. The decision is necessary for uniformity within the jurisdictions and also to allow authorities within the individual states to make informed and knowledgeable decisions concerning

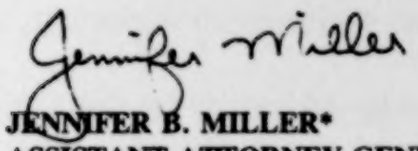
whether the Program is beneficial to their respective state.

CONCLUSION

For the reasons stated above, the Petitioners, Leroy L. Young and the Attorney General for the State of Oklahoma respectfully requests this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA



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APPENDIX

APPENDIX A

ERNEST EUGENE HARPER,
Petitioner-Appellant,

v.

LEROY L. YOUNG; ATTORNEY GENERAL OF OKLAHOMA,
Respondents - Appellees.

No. 95-5026

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 93-C-948-B)

Submitted on the briefs without oral argument.

Ernest Eugene Harper, Pro Se, Boley, Oklahoma

W.A. Drew Edmondson, Attorney General of Oklahoma, and Jennifer B. Miller, Assistant Attorney General, Oklahoma City, Oklahoma, for Respondents-Appellees.

Before SEYMOUR, Chief Judge, McKAY and HENRY, Circuit Judges.

McKAY, Circuit Judge.

Mr. Ernest Harper, presently an inmate in the Oklahoma prison system, challenges the constitutionality of the process by which he was terminated from the Oklahoma Pre-parole Conditional Supervision Program ("the Program") -- a penal status similar to, although more restrictive than, parole that allows convicts to live and work in society. The parties do not dispute that Mr. Harper received verbal notice of his renewed incarceration somewhat less than five hours before he was to turn himself in to authorities and that he was never granted any sort of hearing at which he could present evidence of any kind. Believing himself to have been deprived of liberty without due process of law, Mr. Harper first exhausted his state remedies, see Harper v. Young, 852 P.2d 164 (Okla. Crim. App. 1993), and then petitioned the district court for a writ of habeas corpus. The district court denied this petition, and Mr. Harper now appeals.

It is well-settled that the Due Process Clause shields from arbitrary or capricious deprivation those facets of a convicted criminal's existence that qualify as "liberty interests." See Morrissey v. Brewer, 408 U.S. 471 (1972); Hewitt v. Helms, 459 U.S. 460 (1983). Certain liberty interests -- of which parole and probation are of greatest salience here -- inhere in the Due Process Clause and are not subject to deprivation without adherence to the strict procedural safeguards of Morrissey. See, e.g., Morrissey, 408 U.S. 471; Gagnon v. Scarpelli, 411 U.S. 778 (1973). More commonly, the liberty interests possessed by those living in prison are created, if at all, by state law. See Sandin v. Conner, No. 93-1911, __ U.S. __, 1995 WL 360217, at * 3-5 (June 19, 1995) (recounting development of caselaw). In Sandlin, the Supreme Court markedly narrowed the ranges of circumstances that will give rise to state-created liberty interest. See id., at * 6 (holding that state-created liberty interests "will generally be limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in

relation to the ordinary incidents of prison life").[1] The Oklahoma Court of Criminal Appeals has, apparently, held under pre-Sandin standards that the state had created a liberty interest in program participation. See Barnett v. Moon, 852 P.2d 161, 162-63 (Okla. Crim. App. 1993).[2] The extent to which that conclusion survives Sandin is a question of no small difficulty.[3]

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[1] **Sandin does not purport to alter the law as it pertains to those liberty interests that inhere in the Due Process Clause itself. See Sandin, 1995 WL 360217, at * 6; See also id., at * 6-7 (opining that prior standards had led courts to interfere in day-to-day management of incarcerated prisoners).**

[2] **The Oklahoma Court of Criminal Appeals did not explicitly hold in Barnett that a state-created liberty interest existed. That court, however, did indicate that removal from the Program for disciplinary reasons should be subject to the procedural protections outlined in Wolff v. McDonnell, 418 U.S. 539 (1974) -- a result which rather strongly suggests that the Oklahoma court found a state-created liberty interest in continued participation in the Program.**

[3] **A state could, presumably, choose to impose procedural standards upon itself that are more stringent that those mandated by the Constitution. It was, of course, unnecessary for the Oklahoma Court of Criminal Appeals to draw such a distinction in Barnett.**

We need not address it today, however, because we hold that program participation is sufficiently similar to parole or probation to merit protection by the Due Process Clause itself.

Established by statute, see Okla. Stat. Ann. tit. 57, § 365 (West 1995), the Program releases qualified inmates into society on a conditional basis. Program participants are chosen by the Pardon and Parole Board. Statutory criteria limit selection to those inmates who are eligible for parole, have served fifteen percent of the relevant sentence, and are within one year of a parole docket date. Id. § 365(A).[4] Although remaining in the "constructive custody" of the Department of Corrections, those in the Program work and reside beyond the confines of a state penal institution and are

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[4] **Additional requirements have been set by Department of Corrections regulation. To qualify for consideration, an inmate must have a verified home offer; must pursue an educational program or otherwise be employed; must have no serious prison misconduct; must be medically cleared; and must have no detainers for prosecution. The state does not contend that Mr. Harper failed to meet any of these conditions.**

thus free to enjoy most of the benefits of a normal existence. In return, a program participant must agree to abide by restrictions similar to those placed upon a parolee.[5] Violation of a condition may result in termination from the Program and a return to incarceration. An otherwise eligible participant who has been denied parole may also be removed from the Program after a ninety-day review period. Okla. Pardon & Parole Bd. Proc. 4-11 (effective Aug. 8, 1991).[6]

The State does not here contend either that Mr. Harper was terminated from the Program because of ineligibility or that it possessed peremptory authority to

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[5] He or she may be searched or visited at any time by a law enforcement officer; must report to an assigned probation officer at frequent intervals; cannot travel freely and may be subject to a curfew; cannot use drugs or alcohol or visit locations where those substances are likely to be present; may be urine-tested at any time; must remain employed or pursue a full-time educational program; must pay monthly fees to the Department of Corrections; and may not assume debt or apply for public assistance without permission. The state admits that Mr. Harper violated none of these prohibitions.

[6] We note that Procedure 4-11 became effective some five months after Mr. Harper was returned to prison.

remove him from the Program. The record, in any event, would support neither contention. Although Mr. Harper was in fact removed from the Program because he was denied parole, nothing in the regulations governing the Program mandated that result. The statute, in relevant part, requires only that an applicant be within one year of parole consideration -- a condition that Mr. Harper has met at all times since his termination. Procedure 4-11, moreover, states that convicts can remain in the program after the denial of parole. The regulations likewise contain no language suggesting that participants may be terminated "at will" upon the denial of parole. Procedure 4-11 indicates the truth of the converse: convicts have both the right to remain with the Program for ninety days after parole denial and the opportunity to be considered for continued placement with the Program. Having determined that Mr. Harper was in fact qualified to remain with the Program, we turn to the question of what procedures should have accompanied his termination from the Program.

The State contends that, similarities to parole notwithstanding, placement in the Program does not effect release from the custody of the Department of Corrections and is, therefore, merely a change in the degree or situs of an inmate's confinement. As such, the State concludes, program participation cannot be equated to parole or probation, and revocation of such participation does not warrant the extensive procedural protections mandated by Morrissey. The Oklahoma Court of Criminal Appeals, adopting the reasoning advocated by the State, has held that participation in the Program is not a liberty interest inherent in the Due Process Clause itself. See Barnett v. Moon, 852 P.2d 161, 162-63 (Okla. Crim. App. 1993).

The identification of the liberty interests that are protected by the Due Process Clause is a question of federal constitutional law that we review *de novo*. See Memphis Light, Gas, & Water Div. v. Craft, 436 U.S. 1, 9 (1978). Thus, while we respect the Court of Criminal Appeals' analysis of the constitutional implications of the Program, we are not bound by it. We are instead persuaded by the contrary holding of

Edwards v. Lockhart, 908 F.2d 299 (8th Cir. 1990). In Edwards, the Eighth Circuit analyzed a program that "released [a prisoner] from confinement and allowed [her or him] to live and pursue studies or work outside corrections facilities under the close supervision of a parole officer." Id. at 300. The program considered in Edwards, like that at issue here, required participants to have a home sponsor, maintain employment or pursue an education, refrain from drugs and alcohol, obtain approval before leaving their county of residence, and obey all applicable Department of Corrections regulations. Id. at 301. Although recognizing that a participant's existence was somewhat less free than that of a parolee, the Edwards court nonetheless held that the similarities were sufficiently strong to warrant the process required by Morrissey:

> Viewing parole and work release on a continuum, with more freedom and self-determination associated with parole and less with work release, we believe that Edwards' participation in this program is more closely related to parole. Certainly Edwards is subject to more constraints in the [] program than she would be if on

> parole, but we find determinative the fact that she has been released from institutional life into society. The constraints applied to Edwards serve to guide her in the outside world, not . . . to confine her to the equivalent of an institutional life.

Id. at 302-03 (citations omitted).

"A liberty interest inherent in the Constitution arises when a prisoner has acquired a substantial, although conditional, freedom such that 'the loss of liberty entailed [by its revocation] is a serious deprivation requiring that the [prisoner] be accorded due process.'" Whitehorn v. Harrelson, 758 F.2d 1416, 1420 (11th Cir. 1985) (quoting Gagnon, 411 U.S. at 781)). Edwards, we think, correctly identifies the dispositive characteristic that marks the point at which the Due Process Clause itself implies a liberty interest: it is the fact of release from incarceration. The liberty associated with a life outside the walls of a penal facility dwarfs that available to an inmate. It is the freedom to "be gainfully employed," "to be with family and friends," and "to form the other enduring attachments of normal life." Morrissey, 408 U.S. at 482. It is the

ability to reside in a home of one's own, without bars or fences or bonds, beyond the immediate authority of guards or wardens. The passage outside the walls of a prison does not simply alter the degree of confinement; rather, it works a fundamental change in the kind of confinement, a transformation that signals the existence of an inherent liberty interest and necessitates the full panoply of procedural protections outlined in Morrissey. See, e.g., id., at 481-84; see also, Brennan v. Cunningham, 813 F.2d 1, 5-6 (1st Cir. 1987) ("[T]he Court has found independent constitutional liberty interests where total release from institutional life has been revoked."); Whitehorn, 758 F.2d at 1420-21 (same); cf. Hewitt v. Helms, 459 U.S. 460, 467-68 1983) (analyzing transfer of inmates into administrative segregations and emphasizing difficulties of prison management and limited rights of incarcerated convicts); Wolfe, 418 U.S. at 561-63 (recognizing difficulties of implementing Morrissey procedures in prison environment).

We are therefore in accord with the Eighth Circuit in concluding that a prisoner release program

which permits a convict to exist, albeit conditionally, in society on a full-time basis more closely resembles parole or probation than even the more permissive forms of institutional confinement. See Edwards, 908 F.2d at 302-03; see also, United States v. Stephenson, 928 F.2d 728, 732 (6th Cir. 1991) (finding inherent liberty interest in continued placement in supervised release program that allowed convicts to live in society); cf. Brennan, 813 F.2d at 5-6 (finding no inherent liberty interest in continued placement with institutional halfway house); Whitehorn, 758 F.2d at 1420-21 (finding no inherent liberty interest in continued participation in work release program that confined convicts to institutional community center). There is no question but that those in the Program enjoy the benefits and joys of gainful employment, the company of family and friends, and the pursuits of humdrum existence. Finding no material distinction between the program addressed in Edwards and that presented here, we adopt the sound reasoning of our fellow circuit. Due process therefore mandates that program participants receive at least the procedural protections described in Morrissey:

> (a) written notice of the claimed violations . . .; (b) disclosure . . . of [the] evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers of lawyers; (f) a written statement by the factfinders as to the evidence relied on and the reasons for [revocation].

Morrissey, 408 U.S. at 489.

The record conclusively demonstrates that the process afforded Mr. Harper fell far short of the Morrissey standard. On March 14, 1991, at 5:30 a.m., Mr. Harper received a telephone call from his parole officer informing him that he had been removed from the program because he had failed to win parole. Mr. Harper was given until 10:00 a.m. to report to the Program office and was returned to prison later that same day. He subsequently was mailed a four-word explanation of the reasons for his removal from the Program. He received no subsequent hearing or other

opportunity to respond to the Parole Board's decision to remove him from the Program. Mr. Harper therefore received no prior written notice of revocation; no opportunity to offer evidence, rebut arguments made against him, or argue on his own behalf; and no meaningful explanation of the reasons for his termination from the program. In sum, the record supports the conclusion that Mr. Harper received almost no process at all before he was deprived of his liberty.[7]

We therefore reverse the decision of the district court and remand with instructions to issue the writ of habeas corpus unless Mr. Harper is reinstated to the Program by the State of Oklahoma. After reinstatement, any attempt to remove Mr. Harper from the Program

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[7] The Oklahoma Court of Criminal Appeals also concluded that Program Procedure 4-11 gives inmates adequate prior notice that they can be returned to prison if parole is not granted. See Harper, 852 P.2d at 165. However, we note that Procedure 4-11 was promulgated on August 8, 1991, some five months after Mr. Harper's termination from the program. In addition, Mr. Harper received none of the other procedural safeguards required by Morrissey and was not even afforded the less comprehensive process deemed necessary by the Court of Criminal Appeals in the companion case of Barnett v. Moon, see Barnett, 852 P.2d at 163.

must, of course, comply with the procedures mandated by this opinion.

REVERSED AND REMANDED.

APPENDIX B

ERNEST EUGENE HARPER,
Petitioner-Appellant,

v.

LEROY L. YOUNG; ATTORNEY GENERAL OF OKLAHOMA,
Respondents - Appellees.

No. 95-5026

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER
Entered February 13, 1996

Before SEYMOUR, McKAY, PORFILIO, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, Circuit Judges.

This matter comes on for consideration of Appellees' Petition for Rehearing and suggestion for rehearing *en banc*.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing *en banc* was transmitted to all of the Judges of the Court who are in regular active service, and a poll was taken.

The Court having been polled on the suggestion for rehearing *en banc*, Rule 35, Federal Rules of Appellate Procedure, **rehearing *en banc* is denied.**

Entered for the Court

PATRICK FISHER, Clerk

By: Opal A. Carter, Deputy Clerk

APPENDIX C

ERNEST EUGENE HARPER,
Petitioner-Appellant,

v.

LEROY L. YOUNG; ATTORNEY GENERAL OF OKLAHOMA,
Respondents - Appellees.

No. 95-5026

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER
Entered February 28, 1996

Before SEYMOUR, Chief Judge, McKAY, PORFILIO, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, Circuit Judges.

The Court, in order to correct a clerical error in the issuance of the order dated February 13, 1996, hereby reissues it in order to reflect that Judges

Anderson, Tacha, Baldock, Brorby and Kelly would grant rehearing.

The order is reissued *nunc pro tunc* and is to be read as follows:

This matter comes on for consideration of Appellee's Petition for Rehearing and suggestion for rehearing *en banc*.

Upon consideration whereof, the Petition for Rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing *en banc* was transmitted to all of the judges of the Court who are in regular active service, and a poll was taken.

The Court having been polled on the suggestion for rehearing *en banc*, Rule 35, Federal Rules of Appellate Procedure, rehearing *en banc* is denied.

Judges Anderson, Tacha, Baldock, Brorby and Kelly would grant rehearing.

Entered for the Court
PATRICK FISHER, Clerk
By: Elisabeth A. Shumaker, Chief Deputy Clerk

APPENDIX D

ERNEST EUGENE HARPER,
Petitioner,

v.

LEROY L. YOUNG, et al.,

Respondents

No. 93-C-948-B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ORDER
Entered January 10, 1995

ORDER

In the present pro-se Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, Petitioner contends that his due process rights were violated when he was removed from the preparole-conditional-supervision program and transferred back to prison without a hearing. Respondent contends that habeas

corpus is not the proper procedure for Petitioner's claims. In the alternative, he argues that Petitioner was provided all the process that was due him. For the reasons stated below, the Court concludes that the Petition for a Writ of Habeas Corpus must be denied.

1. BACKGROUND

Following his conviction for first degree murder in the District Court of Tulsa County, Case No. CRF-75-2445, on April 7, 1976, Petitioner was sentenced to life imprisonment. On October 16, 1990, the Oklahoma Department of Corrections (DOC) placed Petitioner under the provisions of the Preparole Conditional Supervision Program (PPCS), Okla. Stat. tit. 57, § 365 (1990). Under that program, Petitioner was allowed to live outside of the institution, hold a job, and be with his family and friends, although he remained under the close supervision of his preparole officer. On March 14, 1991, Petitioner's PPCS status was revoked without a hearing and Petitioner was returned to the custody of the DOC. The only process given Petitioner was notification that the Governor had refused to grant him parole and that he would be reincarcerated.

In March, 1992, Petitioner filed a Petition for a Writ of Habeas Corpus in the District Court for Okfuskee County, alleging that his PPCS status was improperly revoked without a hearing. He argued that he had a liberty interest in remaining on PPCS sufficient to require due process prior to revocation. The district court denied relief, finding that habeas corpus was not the proper procedure to challenge the revocation of his PPCS status. On appeal, the Court of Criminal Appeals rejected the district court's conclusion that a Writ of Habeas Corpus was not appropriate, but concluded that Petitioner was not denied due process when he was removed from PPCS without a hearing. The Court of Criminal Appeals concluded that Pardon and Parole Board Procedure No. 004-11, effective August 8, 1991, gave Petitioner "sufficient notice when he [was] placed in the program that he may be removed from it when the Governor exercises his discretion and declines to grant parole." Harper v. Young, 852 P.2d 164, 165 (Okla. Crim. App. 1993). Procedure No. 004-11 provides that inmates who are denied parole by the governor shall remain on PPCS, but their cases shall be

reviewed by the Parole Board ninety days from denial to determine whether that status will be continued.[1]

In the present petition, Petitioner argues that Procedure No. 004-11, effective five months after the revocation of his PPCS status, was inadequate notice in his case. He also argues that the "application of said policy to Petitioner is a retroactive law as applied to him and as such is violative of his constitutional rights as *ex post facto* law."

Respondent asserts that habeas corpus is not the proper procedure for Petitioner's claim. He argues that the claim for reinstatement challenges the conditions of confinement and not the fact or length of confinement, and therefore the petition should be dismissed. In the alternative, Respondent argues that Petitioner was not denied due process when he was removed from the PPCS program without a hearing because he remained in the custody of the DOC while being on PPCS. Respondent argues that the PPCS program merely

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[1]Petitioner was not granted a ninety-day review by the Parole Board under Procedure No. 004-11 because he was re-incarcerated prior to the enactment of that Procedure.

changes the degree and the situs of an inmate's confinement, citing Barnett v. Moon, 852 P.2d 161, 163 (Okla. Crim. App. 1993).

II. DISCUSSION

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also, Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record. See Townsend

v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992).

Next the Court turns to the substantive issues in this case: (1) whether Petitioner properly brought this action under the federal habeas corpus statute, and (2) whether Petitioner had a liberty interest in remaining on the PPCS program.

A. Appropriateness of this Habeas Corpus Action

As noted above, Respondent challenges the appropriateness of maintaining this action under the federal habeas corpus statute. He argues that the claim for reinstatement challenges the conditions of confinement and not the fact or length of confinement. Citing Preisser v. Rodriquez, 411 U.S. 475 (1973), Respondent contends that the proper vehicle for such a challenge is the civil rights statute. The Court disagrees.

In Preiser, 411 U.S. at 499-500, the U.S. Supreme Court "explicitly left open the possibility that a challenge to prison conditions, cognizable under § 1983, might also be brought as a habeas corpus claim." Brennan v. Cunningham, 813 F.2d 1, 4 (1st Cir. 1987).

Moreover, the nature of the PPCS program shows that it is more closely related to the length, rather than simply the conditions of confinement. Therefore, the Court concludes that the revocation of PPCS may be properly challenged in a habeas corpus proceeding. See Brennan, 813 F.2d at 4-5.

B. Liberty Interest

The main issue in this case is whether Petitioner had a liberty interest, implicating due process protections, in remaining on the PPCS program. Such an interest may arise either under the Fourteenth Amendment or under state law.

1. Fourteenth Amendment

The Supreme Court has consistently held that prisoners under confinement do not have a liberty interest deriving independently from the Constitution, even in cases concerning parole and good time credits. See Hewitt v. Helms, 459 U.S. 460 (1983); Wolfe v. McDonnel, 418 U.S. 1 (1979). The Court has found, however, independent liberty interests where total release from institutional life has been revoked, as in the case of a parolee, or where the restrictions imposed go

beyond the original conditions of confinement. See Morrissey v. Brewer, 408 U.S. 471 (1972) (independent constitutional due process protection in case of revocation of parole); Vitek v. Jones, 445 U.S. 480 (1980) (independent due process protection in involuntary transfer to mental hospital); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (independent constitutional due process protection in case of revocation of probation). "A liberty interest inherent in the Constitution arises when a prisoner has acquired a substantial although conditional freedom such that 'the loss of liberty entailed [by its revocation] is a serious deprivation requiring that the [prisoner] be accorded due process.'" Whitehore v. Harrelson, 758 F.2d 1416, 1420 (11th Cir. 1985) (footnote omitted) (quoting Gagnon, 411 U.S. at 781).

An inmate on PPCS is granted a measure of liberty that lies between that of a parolee and that of an inmate incarcerated in prison. A prisoner on PPCS enjoys considerable liberty similar to a parolee. He lives outside an institution and is free to work and be with his family and friends, while remaining under the

close supervision of his preparole officer. Unlike a parolee, however, a prisoner on PPCS has not yet "been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person." Morrissey, 408 U.S. at 482. He is instead permitted to live in the world outside the prison walls, although still in "custody" of the DOC, prior to the granting of parole as an alternative to incarceration due to overcrowding in the prison system.

Okla. Stat. Ann tit. 57, § 365(A) (emphasis added) states as follows:

> Whenever the population of the prison system is certified by the State Board of Corrections as exceeding ninety-five percent (95%) of its capacity . . . the Department of Corrections and the Pardon and Parole Board shall implement a Preparole Conditional Supervision Program until such time as the population is reduced to ninety-two and one-half percent (92 1/2%) of capacity, for persons in the custody of the department of Corrections who meet the following guidelines:

> (1) Only inmates who are otherwise eligible for parole, pursuant to Sections 332.7 and 332.8 of this title, shall be eligible to participate in this program;
>
> (2) An inmate shall serve at least fifteen percent (15%) of his sentence of incarceration and be within one (1) year of his regularly scheduled parole consideration date or be within twenty-one (21) months of his projected release date, prior to being eligible for this program; and
>
> (3) Only inmates who have attained the proficiency level established by Section 3 of this act . . . or who comply with education requirements as provided in subsection C of Section 4 of this act shall be eligible for participation in this program.

Pursuant to Section 365, an inmate on PPCS cannot be equated to an inmate who has been granted parole -- i.e., conditional release intended to permit the prisoner to demonstrate that he can function in society.[2]

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[2]Nor can an inmate on PPCS be equated to a prisoner who returns to an institutional setting at night after working or studying outside the prison walls. Cf. DeTomaso v. McGinnis, 970 F.2d 211 (7th Cir. 1992); O'Bar v. Pinion, 953 F.2d 74 (4th Cir. 1991); Codd v. Brown, 949 F.2d 879 (6th Cir. 1991); Brennan v. Cunningham, 813 F.2d 1 (1st Cir. 1987);

In fact, an inmate on the PPCS program, unlike an inmate on parole, is required to remain eligible for parole in order to participate in the program. See Section 365(A)(1). He is subject to the DOC's disciplinary proceedings should he violate any of the rules of the PPCS program. See, Section 365(E). He is deemed in constructive custody of the DOC for purposes of Escape from Custody of the Department of Corrections, Okla. Stat. tit. 21, § 443 (West Supp. 1995), should he not be located within twenty four hours or if he fails to report to a correctional facility or institution, as directed. See Section 365(F). Lastly, an inmate on PPCS is required to attend and progress satisfactorily in an educational program.

In Barnett v. Moon, 852 P.2d 161, 163 (Okla. Crim. App. 1993), the Court of Criminal Appeals

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Whitehorn v. Harrelson, 758 F.2d 1416 (11th Cir. 1985); see also, Beasley v. Duncil, 792 F.2d 485 (S.D.W.Va 1992), affirmed, 9 F.3d 1106 (4th Cir. 1993). In the above cases, the courts concluded that prisoners did not possess an independent liberty interest arising under the fourteenth Amendment in remaining in a work/study release program or halfway house because their situation was different from that of a parolee.

concluded that because an inmate on PPCS remains in the custody of the DOC he is not entitled to the protections set out in Morrissey v. Brewer, 408 U.S. 471 (1972). The court stated as follows:

> By definition, Preparole is not the same as parole. The prefix "pre" means "in front," "before," or "in advance." XII Oxford English Dictionary, at 294 (2d ed. 1989). Here, it implies a preparatory or preliminary status present before the sought-after status is manifested. therefore, preparole is by definition not parole, but a preparatory status to parole itself. And since "parole" means release form [sic] jail, prison or other confinement after actually serving part of a sentence, [Black's Law Dictionary at 1116 (6th ed. 1990], logically preparole means before such release.
>
> . . .
>
> Under this program (the PPCS Program), a person in the custody of the Department of Corrections is placed in a specific city or town after proper notification of authorities there (Section 365(D)). An inmate on PPCS remains in the custody of the Department of Corrections. See 57 O.S.1991, § 365(A). Thus, only the

> degree of his confinement is affected by his placement on the PPCS Program.

Barnett, 852 P.2d at 162-63.

In Pece v. Neuman, et al., Case No. CIV-90-44-T (W.D.Okla. Aug. 28, 1990) (unpublished opinion, attached to Respondent's Rule 5 response), the Western District of Oklahoma held that probation/parole protections of Morrissey v. Brewer do not apply to an inmate removed from PPCS status as a result of a program violation because the statute itself provides that any violation of rule or condition would subject an inmate to the disciplinary proceedings established by the Department of Corrections. Similarly in Gloria v. Miller, 658 F.Supp. 229, 232 (W.D.Okla. 1987), the Western District held that Oklahoma's house arrest program was not probation or parole and that inmates in the house arrest program, as well as the PPCS program, remain in the custody of the DOC. See 57 O.S.1991, § 510.2.[3]

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[3]**In Oklahoma, the house arrest program, much like the PPCS program, authorizes prisoner to be in a community away from a correctional facility for the purpose of reintegration of the person into society.**

Petitioner asks this Court to reject the reasoning of the Oklahoma Court of Criminal Appeals in Barnett and to adopt the Eight Circuit's analysis in Edwards v. Lockhart, 908 F.2d 299 (8th Cir. 1990), because his status on PPCS was more like that of a parolee than an inmate in the custody of the DOC in that he lived outside an institution, was free to work and interact with family and friends. The Court declines to apply Edwards to the case at hand. Edwards involved an inmate who had been released from institutional life completely pursuant to a work/study release program which equated for all purposes to parole. The Eighth Circuit there held that the prisoner had a liberty interest in remaining on the work release program sufficient to require due process prior to revocation because she was allowed to live in the world outside prison walls just like a parolee. The court noted that while "Edwards is subject to more constraints in the 814 program than she would be if on parole, . . . we find determinative the fact that she has been released from institutional life into

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society. The constraints applied to Edwards serve to guide her in the outside world, not . . . to confine her to the equivalent of an institutional life." Id., at 302-03.

Because the Petitioner in the case at hand had not been released from institutional life altogether while participating on the PPCS Program, he did not have a liberty interest protected by the Fourteenth Amendment in retaining his PPCS status. As noted above, the Supreme Court has inferred inherent due process protections only in cases in which the prisoner's "release from institutional life altogether" has been revoked, Hewitt v. Helms, 459 U.S. at 468; Morrissey v. Brewer, 408 U.S. 471 and Gagnon v. Scarpelli, 411 U.S. at 778; or in cases in which the restrictions imposed go beyond the original conditions of confinement, see Vitek v. Jones, 445 U.S. 480.[4] Although Petitioner was permitted to live outside an institution, work and interact with family and friends,

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[4]The benefit of PPCS as a statutory aid to relieve prison overcrowding would be lost if the DOC were required to provide due process protection as set out in Morrissey v. Brewer every time a prison's PPCS status is revoked.

his release from institutional life was conditioned on obtaining parole. Moreover, Petitioner's return to the general prison population did not subject him to confinement beyond the sentence initially imposed upon him. See Vitek, 445 U.S. at 480. Therefore, because the Supreme Court has steadfastly refused to expand the scope of liberty interest, the Court finds it compelling to conclude that Petitioner did not have a liberty interest protected by the Fourteenth Amendment in remaining on the PPCS program once the governor exercised his discretion to deny Petitioner's parole.

2. State Created Liberty Interest

The Court turns next to state statutes and regulations to determine if there is a liberty interest derived from state law. To establish a liberty interest deriving from state law, a prisoner must show

> "that particularized standards or criteria guide the State's decision makers." If the decision maker is "not required to base its decisions on objective and defined criteria," but instead "can deny the requested relief for any constitutionally permissible reason or for no reason at

> all,". . . the State has not created a constitutionally protected liberty interest.

Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (cites omitted).

After reviewing the DOC procedures in effect at the time Petitioner was re-incarcerated, the Court concludes that the procedures do not contain any mandatory language or specific directives that if the inmate meets the criteria, he shall be placed in the pre-parole conditional supervision program. The procedures merely list the eligibility and placement criteria to be considered and do not contain mandatory language that Petitioner shall remain in the program even if he is not eligible for parole. Only after Petitioner's return to confinement the DOC amended the regulations to provide that inmates who are denied parole by the governor shall remain on PPCS, but their cases shall be reviewed by the Parole Board ninety (90) days from denial to determine whether that status will be continued.

Because neither the statute nor the regulation in question at the time of the revocation of the Petitioner's

PPCS status created a liberty interest, Petitioner was not entitled to due process protection as set out in Morrissey v. Brewer.

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that Petitioner did not have a liberty interest under either the Fourteenth Amendment or State law in remaining on the PPCS program. Only the degree of his confinement was affected by his transfer from the PPCS program to an institution within the Oklahoma Department of Corrections. Accordingly, Petitioner was not entitled to the protections of Morrissey v. Brewer, 408 U.S. 471 (1972), when he was removed from the PPCS program.

The Petition for a writ of habeas corpus is hereby **denied**.

SO ORDERED THIS 9TH DAY OF JANUARY, 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

APPENDIX E

ERNEST EUGENE HARPER, Petitioner

v.

LEROY YOUNG, Warden, Respondent

No. H 92-735.

COURT OF CRIMINAL APPEALS OF OKLAHOMA

April 15, 1993.

Order Published and Corrected May 11, 1993

ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS

Petitioner Ernest Eugene Harper filed an application in this Court for a writ of habeas corpus, alleging the Department of Corrections (DOC) released him from custody under the provisions of the Preparole Conditional Supervision Program (PPCS), pursuant to 57 O.S.1991, § 365; that he violated no rules or conditions of the PPCS; but was nonetheless removed from the program without due process requirements set

forth in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

The District Court of Okfuskee County, Case No. C-92-44, denied Petitioner's application for a writ of habeas corpus on May 19, 1992, finding habeas corpus is not the proper procedure to challenge revocation of PPCS status. We disagree. An application for a writ of habeas corpus is appropriate when a prisoner contends his confinement is unlawful. See 22 O.S.1991, Ch. 18, App., *Rules of the Court of Criminal Appeals*, Rule 10.6(C). This Court on September 10, 1992, directed the Attorney General of the State of Oklahoma to respond to the application. That response was filed with this Court on November 10, 1992.

In this Court's unpublished order, we indicated the minimum requirements of *Morrissey* must be observed before a person can be removed from the PPCS program for a rule or condition violation. We need not go through a complete discussion of Petitioner's due process complaint, as it is not dispositive of the issue before us and is fully addressed in *Barnett v. Moon*, 852 P.2d 161, 64 OBJ 1281

(Okl.Cr.1993). As set forth in *Barnett*, the question concerning the PPCS program is not whether an inmate is in custody, because he is; but the degree of confinement used in that custody. The degree of confinement is not of concern to this Court, so long as an administrative procedure affords an appropriate method by which the decision to change the degree of confinement can be justified. Beyond that, there is no constitutional Due Process concern, as it ultimately will have no bearing on when the inmate is released. Therefore, the requirements outlined in *Morrissey* need not apply.

Dispositive of the issue in Petitioner's case is the fact he was not granted parole by the Governor of Oklahoma. It is for this, not a disciplinary reason, he was removed from the PPCS program. The State contends Petitioner has suffered no due process violation due to the fact inmates are aware they will only remain on PPCS status so long as they remain otherwise eligible for parole, and are given notice of the factors which will be considered and what is necessary to remain in the program.

In support of its position, the State attached a copy of Pardon and Parole Board Procedure No. 004-11, effective August 8, 1991, entitled "Pre-Parole Conditional Supervision (PPCS)." Under that procedure, inmates who are denied parole by the governor shall remain on PPCS, but their cases shall be reviewed by the Parole Board ninety days from denial to determine whether that status will be continued.

We believe such a procedure gives an inmate sufficient notice when he is placed in the program that he may be removed from it when the governor exercises his discretion and declines to grant parole. The governor's refusal to grant parole does not change the fact that petitioner is confined and the provisions of *Morrissey* do not apply. The procedures used by the Pardon and Parole Board in determining whether Petitioner should stay in the PPCS program assure Petitioner he is receiving the process that is due him.

Accordingly, Petitioner's application for a writ of habeas corpus is hereby **DENIED**.

IT IS SO ORDERED.

/s/ GARY L. LUMPKIN, Presiding Judge

/s/ **CHARLES A. JOHNSON, Vice Presiding Judge**

/s/ **JAMES F. LANE, Judge**

/s/ **CHARLES S. CHAPEL, Judge**

APPENDIX F

DEPARTMENT OF CORRECTIONS' MANUAL

Okla. Stat. tit. 57, § 365 (Supp. 1988)

OFFENDER MANAGEMENT AND SERVICES MANUAL - PROGRAMS - OUT-COUNT PROCEDURES

Effective Date 7/04/90 OP-090104 Pages 10-14

III. Pre-Parole Conditional Supervision Placement (PPCS) Procedures

Any inmate recommended for pre-parole conditional supervision by the Pardon and Parole Board shall meet the following guidelines for placement to this status. The coordinator of Out Count Placement shall ensure appropriate placement and transfer of inmates to PPCS.

A. Eligibility Criteria for the Pre-Parole Conditional Supervision Program

1. All violent and nonviolent crimes are eligible as long as the offender has served 15 percent of the current sentence and is within one year of a parole docket date. All offenses and offenders are included with the following exceptions:

a. Inmates serving death sentences

b. Inmates serving life without parole

c. Inmates on house arrest

d. Inmates with consecutive sentences or valid detainers

e. Commutation eligible inmates

f. Inmates serving a parole violation

g. Inmates who have escaped while serving the current sentence(s)

B. Pre-Parole Conditional Supervision Application Packets

1. Upon notification by the Pardon and Parole Board that an inmate has been recommended for pre-parole conditional supervision, the facility head shall ensure that a PPCS application packet is submitted within four working days to the population office at LARC.

This packet shall include:

a. "Program Referral Form/Residential Information" (DOC Form 090048)

b. "Facility Assignment Form" (DOC Form 062040

c. "Current Medical Screen" (DOC Form 161060)

d. "CRC" (DOC Form 063002) (front and back)

e. "PPCS Rules and Conditions" (signed and witnessed)

2. Those inmates that meet placement criteria but do not appear to be appropriate candidates for release by the out count placement coordinator shall be referred for administrative review. An administrative review committee comprised of representatives of both the Department of Corrections and the Pardon and Parole Board shall meet to resolve any pending placement decisions. If an inmate is denied placement to the PPCS program by the administrative review committee, the PPCS "Administrative Review Report" shall be completed and signed, attached to the application packet, and returned to the facility. The original shall be placed in Section 5 of the offender field file.

3. The case manager supervisor/unit manager at each affected facility shall advise the inmate(s) of the denial upon receipt of the denied packet.

4. A copy of the administrative review form shall be forwarded to the population office and the Pardon and Parole Board.

5. Offenders who have no home offers in Oklahoma shall have PPCS packets submitted to the out-count office at Lexington. Included in the packet shall be a "Housing Referral" (DOC Form 090051) indicating in which part of the state the offender wants to live. Upon receipt of these packets, the out count administrative office shall forward the "Housing Referral" form to the appropriate reintegration specialist who shall attempt to secure suitable transitional housing for the offender. If no acceptable housing is obtained within 60 days, the reintegration specialist shall notify the administrative officer in the out count office. The packet shall then be denied and returned to the facility. The case manager/unit manager shall inform the offender upon receipt of the packet.

6. Offenders who refuse to sign the appropriate forms for PPCS placement shall have packets submitted to the population office. The FAF and "Reclassification Security Assessment" shall indicate the reason for the offender's refusal to sign the forms. This information shall be forwarded to the

Pardon and Parole Board in the monthly report.

C. Placement Criteria

The administrative officer in the population office shall consider the following criteria when making placement decisions to PPCS:

1. Each inmate considered for placement to PPCS must:

   a. Have a verified home offer.

   b. Be medically cleared.

   c. Have no serious misconducts during the placement period to PPCS. (Facility must ensure population office is notified of any "Offense Reports" during that time period).

   d. Be employed or deemed employable. Any inmate unemployed or not involved in an approved activity (going to school, community service, etc.) in excess of 30 days shall normally be removed from PPCS.

e. Have no detainers for prosecution.

2. Knowledge of aggravating circumstances may be considered in placement decisions.

3. Upon receipt of the application packet, the population office shall submit a residential verification list to the probation and parole districts.

4. It shall be the responsibility of the Division of Probation and Parole to verify the proposed home offer and notify the population office by computer message within five working days of receiving the residential verification list as to the suitability of the proposed home offer. Verification of transitional home placements are to be made by the Reintegration Unit.

5. Any inmate enrolled in a vo-tech program, participating in Lifesteps, or on a waiting list for, or participating in, TADD or CAP shall complete the program before transferring to PPCS.

6. The administrative officer in the population office shall approve placements, schedule and coordinate moves to PPCS.

7. Any inmate who does not meet the placement criteria shall be denied by the administrative officer in the Population Office. The reason for denial shall be indicated on the FAF in the packet and returned to the facility. The unit manager/case manager supervisor shall ensure the inmate is advised of this decision. The returned application packet shall be placed and retained in the classification file.

8. It shall be the responsibility of the administrative officer to advise the Pardon and Parole Board of all approved PPCS moves on a weekly basis. The out count placement coordinator shall also furnish a monthly report to the Pardon and Parole Board which shall include the status of all inmates recommended to the PPCS program. This report shall include:

a. All cancellations (to include the reason for cancellation).

b. All denials (to include the reason for denials).

c. Any special circumstances on pending placements.

9. The administrator of Classification and Programs shall ensure that the appropriate district attorneys and law enforcement officials are notified prior to inmates transferring to PPCS.

10. Facilities are responsible for ensuring inmates approved for PPCS placement have transportation arrangements and leaves, if necessary, to allow them to report to the probation and parole district office on time.

11. Any inmate who fails to report to the Probation and Parole district as dictated on the "Leave Form (DOC Form 090027)" shall be considered to have escaped from the sending facility while on leave.

V. References

Battle v. Anderson, No. 7295-CIV, E.D. Okl., March 1982

Standards for Adult Correctional Institutions, Second Edition. (September 1981). Standards 2-4305, 2-4479

Standards for the Administration of Correctional Agencies, Standard 80

21 O.S. 443
47 O.S. 11-902
57 O.S. 365
57 O.S. 510.1, 2
57 O.S. 561
74 O.S. 85.41

VII. Action

The associate director shall be responsible for compliance with these procedures.

Any exceptions to this operations memorandum require prior written approval from the director.

These procedures shall be effective 30 days after signing.

Deleted: Section 3, Chapter V, entitled "Procedures for the Placement of Inmates on an Out County Program" of the Offender Management and Services Manual, dated January 5, 1989.

Distribution: Policy and Operations Manuals

Signed: Gary D. Maynard, Director
Oklahoma Department of
Corrections 6/4/90

APPENDIX G

PARDON AND PAROLE BOARD PROCEDURE NO. 004-11 Effective 8-8-91

I. TITLE: Pre-Parole Conditional Supervision (PPCS)

II. PROCEDURE:

The Executive Director shall assist the Pardon and Parole Board to consider inmates for Pre-parole conditional supervision as required by law and shall issue criteria for consideration. Pre-parole conditional supervision is utilized when capacity at Department of Corrections institutions is ninety-two and one-half (92 1/2%) percent or above and will continue until ninety-two and one-half (92 1/2%) capacity is reached.

A. As directed by the Pardon and Parole Board, the Executive Director shall issue criteria for consideration of qualified inmates for pre-parole conditional supervision.

1. The Executive Director shall issue criteria for the selection of inmates and eligibility based on the amount of time served and the parole eligibility date. Criteria shall be periodically adjusted as needed to reduce the prison population through early

release. Statutory criteria for pre-parole conditional supervision eligibility include:

a. Inmate must have served fifteen (15%) percent of sentence by time of release on PPCS.

b. Inmate must be within one (1) year of the regularly scheduled initial parole consideration.

c. Also, inmates who are within twenty-one (21) months of their projected release date.

2. Administrative criteria for pre-parole conditional supervision eligibility shall include all except the following:

a. Inmates who have consecutive cases.

b. Inmates serving death sentences.

c. Inmates serving life without parole.

d. Inmates serving a controlling case for a parole violation.

e. Inmates with a docket for annual from escape.

3. The following guidelines shall apply to the calculation of pre-parole conditional supervision dockets:

a. Inmates must have served 15% of their time and be within two (2) to thirteen (13) months of their regularly scheduled docket date.

b. For those inmates who are serving indeterminate sentences, the fifteen (15%) percent shall be calculated on the maximum rather than the minimum sentence.

4. Inmates eligible for this program shall only be considered once prior to their initial parole consideration.

5. At an inmate's regularly scheduled docket it may be recommended that the inmate participate in the PPCS program prior to parole.

6. Inmates who are not recommended by the Board will be considered for parole on the regularly scheduled docket.

7. Inmates who are placed on PPCS and successfully reach their parole docket date will automatically be recommended for parole to the Governor at that time, or if serving a mandatory term will be recommended at their parole eligibility date.

8. Inmates who are denied by the Governor shall remain on PPCS and shall be reviewed by the Parole Board ninety days from denial to determine whether or not the Parole Board desires to allow the inmate to remain on PPCS.

9. The Executive Director shall coordinate the responsibilities of investigators for the preparation of pre-parole conditional supervision reports with the parole coordinator for the Department of Corrections.

a. The investigators will provide a report for each inmate eligible for pre-parole conditional supervision. The pre-parole report shall follow the definitions for investigative reports as defined in Procedure 006-2 and shall include:

(1) Docket month and year

(2) Parole docket date/reason

(3) Inmate's facility (abbreviation)

(4) Name of person preparing form

(5) Date prepared

(6) Inmate's name

(7) DOC number

(8) Date of birth/age

(9) Sex

(10) Controlling offense

(11) Sentence length

(12) County of conviction

(13) Felony case number

(14) Reception/rebill date

(15) Jail time

(16) Offense history

(17) Current release date

(18) Projected release date

(19) Number of prior incarcerations

(20) Security level

(21) Concurrent and/or consecutive cases or detainers

(22) Chronology of other felony convictions

(23) Official version of offense as indicated by a documented source

(24) Inmate's version of instant offense

(25) Institutional assignments and transfers

(26) Institutional disciplinary record

(27) Institutional participation program

(28) Institutional work performance

(29) Pre-parole plan

(30) Evaluation of previous adult community supervision and deferred sentences

(31) Juvenile institutionalization/supervision

(32) Substance abuse and mental health history and treatment

(33) Evaluation of disciplinary record

(34) Personal and family information

(35) Miscellaneous

(36) Recommendation

(37) Rationale and documentation or relevant comments supporting the recommendation, and any program stipulations. (Stipulated programs to be completed prior to or following release).

b. Investigators shall verify the accuracy and completeness of information with the file. The report shall be forwarded to the appropriate personnel as required by the deadline schedule.

c. If the inmate is found to be ineligible for pre-parole, the investigator shall send a memo to the Deputy Director with a recommendation that said inmate be removed from the PPCS docket.

III. BASIS FOR PROCEDURE:

A. Pardon and Parole Board Policy 004 - Establishment of docketing criteria for consideration of paroles, pre-parole conditional supervision, sentence commutations, leaves of absence and pardons.

B. To ensure compliance with 57 O.S.Supp. 1988, § 577 requiring pre-parole conditional supervision.

C. To provide guidelines for considering pre-parole conditional supervision to reduce prison crowding.

DATE APPROVED: 8/8/91

BY: RAY H. PAGE, EXECUTIVE DIRECTOR